

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-78

In the Matter of

Amendment of Section 73.202(b), RM-8472
Table of Allotments, RM-8525
FM Broadcast Stations.
(Cloverdale, Montgomery and
Warrior, Alabama)¹

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1995; Released: December 11, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 3311 (1994), issued in response to a petition for rule making filed on behalf of Pulaski Broadcasting, Inc. ("petitioner") proposing the allotment of FM Channel 254A to Cloverdale, Alabama, as that locality's first local aural transmission service. Peti-

tioner filed late comments² in response to the *Notice*. Comments and counterproposals were filed individually by Leland Michael Tracy ("Tracy"),³ and William P. Rogers ("Rogers").⁴ A joint counterproposal was filed on behalf of North Jefferson Broadcasting Company, Inc., licensee of Station WLBI(FM), Channel 254C3, Warrior, Alabama, and Deep South Broadcasting Company, Inc., licensee of Station WBAM-FM, Channel 255C, Montgomery, Alabama (referred to herein as "North Jefferson and Deep South" or "co-proponents").⁵ The co-proponents seek the substitution of Channel 254C1 for Channel 254C3 at Warrior, Alabama, and modification of the license for Station WLBI(FM) accordingly. Additionally, in order to accommodate the proposal, co-proponents seek the substitution of Channel 255C1 or Channel 255C2 for Channel 255C at Montgomery, Alabama, and modification of the license for Station WBAM-FM to specify the lower class channel. Comments in opposition to the proposed allotment at Cloverdale were filed on behalf of Slatton-Quick Company, Inc., licensee of Station WLAY-FM, Muscle Shoals, Alabama, and Benny Carle Broadcasting Co., licensee of Station WXFL(FM), Florence, Alabama (referred to herein as "co-objectors").⁶ Reply comments were filed on behalf of James Michael Self ("Self").⁷ Responsive comments to the Public Notice were filed jointly by North Jefferson and

¹ The communities of Montgomery and Warrior, Alabama,

have been added to the caption.

² Petitioner's comments, which contained a counterproposal to allot Channel 254A to Saint Florain, Alabama, in lieu of its original proposal, were filed in the Office of the Secretary one day after the cut-off date specified for initial comments in this proceeding, and are therefore untimely. See Section 1.420(d) of the Commission's Rules and the Appendix to the *Notice*. As a result of the procedural deficiency, petitioner's comments are not acceptable and no further consideration thereof will be given. See *Hazlehurst, Utica and Vicksburg, Mississippi*, 9 FCC Rcd 6439 (1994), n.4.

³ Tracy requested the allotment of Channel 254A to Crump, Tennessee. However, the proposal is technically unacceptable as it is 28.2 kilometers (17 miles) short-spaced to the licensed site of Station WZLQ(FM), Channel 253C1, Tupelo, Mississippi, at coordinates 34-18-09 and 88-42-21 (File No. BLH-4360), in contravention of Section 73.208(a)(1)(i) of the Commission's Rules. Although the proposal meets the minimum distance separation requirements to the site specified in the construction permit issued to Station WZLQ(FM), (File No. BPH-930812IB), that authorization has expired, and we have no indication from the Commission's records that a petition for reinstatement of the authorization to build has been filed.

⁴ Rogers requested the allotment of Channel 254A to Florence, Alabama. However, Rogers counterproposal is technically defective and was not placed on public notice as it too is short-spaced to the licensed site of Station WZLQ(FM), Tupelo, Mississippi. While the Florence the proposal meets the minimum distance separation requirements to the construction permit issued to WZLQ(FM), that authorization has expired (see footnote 3, *supra*). Additionally, a staff engineering analysis of the proposal

reveals that Rogers' proposal is technically defective. According to Rogers' engineering statement, operation on Channel 254A with maximum Class A facilities (i.e., 6 kW at 100 meters HAAT) at its specified site located 17.7 kilometers (11 miles) northwest of the community at coordinates 34-56-19 and 87-46-17, would extend a 70 dBu signal over 88% of the area and population within the boundaries of Florence. Rogers believes that degree of coverage substantially complies with the provisions of Section 73.315(a) of the Commission's Rules, citing in support *Barry Skidelsky*, 70 Pike and Fischer RR 2d 722 (Rev. Bd. 1992). However, Rogers proposal contemplates the use of terrain factors to enhance propagation of a 70 dBu signal in the direction of Florence, which is an option available only to existing authorizations at the allotment level. See *Woodstock and Broadway, Virginia*, 6398 (1988). Rogers reliance on *Barry Skidelsky, supra*, is misplaced. In that comparative hearing proceeding, it was determined that "substantial compliance" with the 70 dBu coverage requirement of Section 73.315(a) demanded of FM applicants is met if 80% coverage of the proposed community of license is demonstrated. Rogers has not cited a case where the Commission granted waiver of the requirement to demonstrate the ability to provide 100% city grade coverage over an entire community at the allotment stage.

⁵ Public Notice of the counterproposal, given October 20, 1995, Report No. 2106, listed the rule making number assigned to this proposal as RM-8718. The correct listing is RM-8525.

⁶ In light of our determination with respect to the Cloverdale proposal (see footnote 2, *supra*), the co-objectors comments have been rendered moot and will not be discussed.

⁷ Self's responsive comments support the petitioner's request to allot Channel 254A to St. Florian, Alabama, in lieu of Cloverdale. However, as the petitioner's counterproposal has been rejected (see footnote 2, *supra*), Self's comments will not be considered.

Deep South.⁸ Reply and Supplementary Reply comments to the Public Notice were also filed on behalf of William P. Rogers.⁹

2. The *Notice* raised the issue of whether Cloverdale qualifies as a community, as required by Section 307(b) of the Communications Act, since it is not listed in the U.S. Census as a separate population grouping.¹⁰ Therefore, petitioner was requested to provide sufficient information to demonstrate that Cloverdale has social, economic, cultural and governmental indicia to qualify it as a community for allotment purposes. As indicated, *supra*, in view of the petitioner's failure to respond timely to the *Notice*, and in the absence of any other party to express an interest and provide information relevant to our request,¹¹ the proposal to allot Channel 254A to Cloverdale, Alabama, will be given no further consideration and will be dismissed.

3. In view of the above, we shall consider only the proposal filed by North Jefferson and Deep South. In support of their proposal, co-proponents state that Channel 254C1 can be allotted to Warrior at a site approximately five miles south in conformity with Section 73.207(b) of the Commission's Rules, if Station WBAM-FM is downgraded to either Channel 255C1 or Channel 255C2. North Jefferson advises that the modification of Station WLBI(FM) to Channel 254C1 would enable it to expand its service area to an additional 691,086 persons, representing a total increase in service to 1,036,922 persons. Further, co-proponents advise that when considered in conjunction with the Montgomery proposal to downgrade Station WBAM-FM to Channel 255C1, the overall benefit would be an increase in population of 651,499 persons. While the co-proponents alternatively suggested the downgrade of Station WBAM-FM to Channel 255C2 at its current site at Montgomery, Deep South also expressed its willingness to relocate its transmitter to accommodate Channel 255C1 in combina-

tion with North Jefferson's requested use of Channel 254C1 at Warrior. The Commission endeavors to allot the highest class channel requested to a community that meets the technical provisions of our rules. *See Ludlow, California*, 10 FCC Rcd 563 (1995). Therefore, the co-proponents having demonstrated that Channel 255C1 at Montgomery meets the technical requirements of the Commission's Rules, as discussed *infra*, and Deep South having consented to relocating Station WBAM-FM from its existing site, if necessary, to accommodate North Jefferson's modification proposal for Station WLBI(FM), we need not consider modification of Station WBAM-FM to Channel 255C2.

4. After careful consideration of the information presented, we believe the public interest would be served by substituting Channel 254C1 for Channel 254C3 at Warrior, Alabama, and by substituting Channel 255C1 for Channel 255C at Montgomery, Alabama, since it would enable Station WLBI(FM) to provide an expanded coverage area service. We note that the downgrade of Station WBAM-FM will result in the loss of service to 39,587 persons. While we carefully consider any proposal that would result in the loss of existing reception service, our records indicate that the affected Montgomery residents will continue to be served by at least three other Class C facilities that operate from the same electronics site as Station WBAM-FM. In addition to Station WBAM-FM, Montgomery is served by six other FM stations, as well as six fulltime AM stations,¹² and therefore, the community is considered to be well served. In addition to the benefits this joint proposal represents to the residents of Warrior, another public interest factor related to the voluntary downgrade of Station WBAM-FM at Montgomery is the elimination of a grandfathered short spacing to Station WAWV(FM), Channel 252A, Sylacauga, Alabama, with the accompanying op-

⁸ Co-proponents advise us of the recent filing of an assignment application affecting Station WLBI(FM). North Jefferson advises that although it seeks to assign the license of Station WLBI(FM) to North South Broadcasting Company, L.L.C. ("North South") (File No. BAPLH-950929GJ), it will retain a 50% interest in the new licensee. Accordingly, co-proponents comment that as principals of the assignee, both principals and the assignee North South, affirm their continuing interest in this proceeding.

Co-proponents also advise that North Jefferson recently filed a one-step application to modify Station WLBI(FM) to a Class C2 facility. To accommodate the application, Deep South filed an application to downgrade Station WBAM-FM to Class C2. Co-proponents advise that the applications were intended as an interim measure to enable Station WLBI(FM) to improve its coverage area pending the outcome of the instant rule making proceeding. Accordingly, co-proponents assert that if their counterproposal should prevail in this proceeding, they will file applications consistent with the Commission's technical rules to modify Station WLBI(FM) to Channel 254C1 at Warrior, and Station WBAM-FM to Channel 255C1, preferably, at Montgomery, Alabama.

⁹ Rogers opposes the Warrior and Montgomery, Alabama, proposals of North Jefferson and Deep South respectively, advocating support instead for any of the other proposals filed in this proceeding. However, in view of our determination, *supra*, with respect to the Cloverdale proposal, as well as the rejection of the counterproposals for Saint Florain and Florence, Alabama, and the requested allotment of Channel 254A to Crump, Tennessee, Rogers reply comments are moot. Moreover, as Rogers timely filed supplementary reply comments attempt *inter alia*, to introduce a new proposal for the allotment of Channel 252A to

Crump, Tennessee, such consideration is clearly inappropriate, even if it met the Commission's technical requirements, as it constitutes an untimely proposal in the context of this proceeding.

¹⁰ Cloverdale is listed in the Census as a *Division* of Lauderdale County. However, according to the Census Bureau, a census county division ("CCD") is a geographical area that is characterized for the purpose of accumulating information for inclusion into the Census. A CCD has no legal function, nor is it a governing unit. The peripheries of a CCD usually follow visible features and commonly coincide with census tract or block numbering area boundaries. Additionally, CCD's are named based on a place, county or familiar local name that identifies its location. *Cf. Hollywood and California, Maryland and King George, Virginia*, 3 FCC Rcd 4043 (1988) (area comprised of collective Census Enumeration Districts ("CEDs" does not constitute a single community for allotment purposes).

¹¹ We note that North Jefferson and Deep South did provide information in an effort to establish that Cloverdale lacks sufficient indicia to qualify as a community for allotment purposes. However, in view of the absence of any interest in pursuing the Cloverdale proposal, there is no need to address the "community" issue further.

¹² In addition to Station WBAM-FM, local service is provided to Montgomery residents by Stations WLFB(FM), Channel 206C1, WVAS(FM), Channel 214C1, WLWI-FM, Channel 222C, WRWO-FM, Channel 241A, WHHY-FM, Channel 270C, WMXS(FM), Channel 277C, as well as fulltime AM Stations WLWI, WMGY, WSYA, WACV, WHHY, and WXVI.

portunity afforded Station WAWV(FM) to operate with 6 kilowatts effective radiated power. Therefore, we will grant the modification requests.

5. Channel 254C1 can be allotted to Warrior at North Jefferson's specified site for Station WLBI(FM), located 8.0 kilometers (4.9 miles) south of the community at coordinates 33-44-30 and 86-48-30. Channel 255C1 can be allotted to Montgomery at Deep South's designated site located 22.9 kilometers (14.2 miles) southeast of the community at coordinates 32-14-45 and 86-07-30.

6. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of North Jefferson Broadcasting Company, Inc. for Station WLBI(FM) to specify operation on Channel 254C1 at Warrior, Alabama. Additionally, we are modifying the license of Deep South Broadcasting Company, Inc. for Station WBAM-FM to specify operation on Channel 255C1 at Montgomery, Alabama, in lieu of its present authorization on Channel 255C.

7. Pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 25, 1996**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Montgomery, Alabama	222C, 241A, 255C1, 270C, 277C
Warrior, Alabama	254C1

8. IT IS FURTHER ORDERED. That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of North Jefferson Broadcasting Company, Inc. for Station WLBI(FM) (File No. BLH-950608KC), Warrior, Alabama, and Deep South Broadcasting Company, Inc. for Station WBAM-FM (File No. BLH-890317KC), Montgomery, Alabama, ARE MODIFIED to specify operation on Channels 254C1 and 255C1, respectively, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter locations or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, North Jefferson Broadcasting Company, Inc., licensee of Station WLBI(FM)

is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Warrior, Alabama.

10. IT IS FURTHER ORDERED, That the petition of Pulaski Broadcasting, Inc. (RM-8472) to allot Channel 254A to Cloverdale, Alabama, IS DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
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